IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.V.K.BALI
&
THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR

TUESDAY, THE 23RD JANUARY 2007 / 3RD MAGHA 1928

WA.No. 570 of 1998(B)

AGAINST THE JUDGEMENT/ORDER IN OP.10420/1997 Dated 20/01/1998
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APPELLANT:
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1. SHAJI C.VARKEY,
CHACKALACKAL HOUSE,
PAINGARAPPILLY P.O.,
MULANTHURUTHY,
ERNAKULAM.

2. SUNNY JACOB C.,
CHEERAMELIL HOUSE,
PERUMPILLI P.O., MULANTHURUTHY,
ERNAKULAM-682 314,
NOW RESIDING AT LEKSHMI,
SREE NARAYANA NAGAR, PETTAH,
TRIVANDRUM.

BY ADV. G UNNIKRISHNAN
SRI.G.UNNIIKRISHNON
SRI.G.P.SHINOD
SRI.S.VENKATASUBRAMONIA IYER(SR.)
SRI.V.GIRI

RESPONDENTS:
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1. THE COLLECTOR(SPECIAL TAHSILDAR,
LAND ACQUISITION, P.W.D. SOUTHERN
CIRCLE, TRIVANDRUM), (APPOINTED BY
THE GOVT. OF KERALA AS PER G.O.(MS).
NO.517/85/RD TO PERFORM THE FUNCTIONS OF
A COLLECTOR UNDER ACT 1 OF 1894).

2. THE ASSISTANT ENGINEER, P.W.D.,
CITY ROAD, SECTION-1, P.M.J. JUNCTION,
TRIVANDRUM, EXERCISING POWERS OF
COLLECTOR.

3. AMBIKA NAIR, TWIN HOUSE,
TANK ROAD, TRIVANDRUM-694 001.

4. MALLIKA NAIR OF .DO. .DO.

R4 BY ADV. SRI.V.CHITHAMBARESH
SRI.D.KISHORE
SRI.R.D.SHENOY (SR.)
R1&2 BY SR.GOVERNMENT PLEADER SRI.BABU P.K.
R3 BY ADV.SRI.S.VINOD BHAT

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 15/12/2006, THE COURT ON 23/01/2007 DELIVERED THE FOLLOWING:

V.K.BALI, C.J. &
C.N.RAMACHANDRAN NAIR, J.

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W.A. No.570 of 1998

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Dated this the 23rd day of January, 2007.

JUDGMENT

Ramachandran Nair, J.

The appellants are tenants carrying on business in a building belonging to respondents 3 and 4, part of which was acquired along with land by respondents 1 and 2 for road widening. In the course of proceedings for acquisition of part of the building, respondents 3 and 4 requested the first respondent under Section 49(1) of the Land Acquisition Act, 1894 (hereinafter called "the Act") to demolish the remaining portion of the building in which the appellants were carrying on business. Apprehending demolition pursuant to request from building owners, the appellants filed writ petition for direction against demolition of the building occupied by them. During pendency of the O.P. filed by the appellants, this court granted stay against demolition of the balance portion of the building occupied by them. However, this court permitted respondents 1 and 2 to proceed with the acquisition and demolition of acquired portion of building to accomplish the purpose of acquisition i.e. widening of road. The acquisition led to demolition of part of the building which necessitated

construction of wall with rolling shutter by appellants to protect their shop-rooms. Even though the Trivandrum Corporation opposed construction of wall and rolling shutter by the appellants that was required to protect the building after part demolition consequent to acquisition, this court vide judgment in O.P. No.10780/1997 which was disposed of along with connected O.P. against which this appeal is filed, upheld the claim of the appellants to retain the wall and the rolling shutter constructed by them to protect the building. The resultant position as of now is that eversince acquisition of land and part of the building thereon and widening of the road which is carried out, the appellants have been continuing business in the very same building under lease from it's owners i.e. respondents 3 and 4 for the last around 8 years. Even though interim orders were in favour of appellants, the writ petition filed by the appellants against demolition of balance portion of the building occupied by them on request by respondents 3 and 4 under Section 49(1) of the Act was dismissed by the learned Single Judge holding that respondents 3 and 4 are entitled to demand acquisition of balance portion of the building in terms of Section 49(1) of the Act and it's demolition. This appeal is filed by the petitioners in the O.P. against the said judgment.

2. We have heard counsel appearing for the appellants, the contesting

respondents and the Government Pleader. The appellants' contention is that the demolition of acquired portion of the building carried out for road widening is so insignificant that the balance building could be continued to be used by them without any difficulty and the attempt by respondents 3 and 4 to have the building fully demolished by respondents 1 and 2 is malafide and to defeat the protection available to appellants as tenants under the Buildings (Lease and Rent Control) Act. The case of respondents 3 and 4 is that part acquisition of the building is impermissible by virtue of Section 49 (1) of the Act and they are entitled to exercise their right to seek acquisition of balance portion of the building. Even though we agree with the contention of counsel for respondents 3 and 4 that part acquisition of the building is impermissible if the building owner desires acquisition of the balance portion of the building by virtue of operation of Section 49(1) of the Act, we are unable to agree with the finding of the learned Single Judge upholding the claim of respondents 3 and 4in this case for more than one reason. In the first place, the request made by respondents 3 and 4, copy of which is produced as Ext.R4(e) in the O.P., neither refers to Section 49(1) of the Act nor does it reveal their desire to have the balance portion of the building acquired by respondents 1 and 2. On the other hand, what they have requested, in their own words, is the following:

"The buildings in the property to be acquired are ancient structures, more than a hundred years old.

In view of the age of the buildings, and the nature of construction, the demolition of a portion of the building, will affect the structural stability of the remaining portion and it would pose a danger to the occupants and to passers by. Hence, it is requested that arrangements may be made to demolish acquired portion and the remaining portion of the building also to be demolished, through the Department."

It is obvious from this letter that what respondents 3 and 4 wanted was demolition of the remaining building by respondents 1 and 2 and not an offer for acquisition of balance portion of the building in terms of Section 49(1) of the Act. Viewed in this manner, the only question to be considered is whether building owner gets right to have the balance portion of the building demolished by the Government through a request under Section 49 (1) of the Act. We are of the view that what Section 49(1) provides is acquisition of balance portion of the building and not demolition or destruction of balance portion which cannot be independently demanded by the building-owner without request for acquisition. Even though Government cannot acquire part of a building, if the building owner desires acquisition of the building as a whole, there is nothing to indicate in the Act as to whether the Collector is bound to demolish the building on acquisition. If the remaining portion of the building is suitable or could be used for public purpose, then we see no reason why the Collector should

order demolition of a good building. The contention of the counsel for respondents 3 and 4 is that Section 49(1) provides for acquisition of only balance portion of the building and not the land on which building is located and so much so, demolition is a necessary consequence of operation of Section 49(1) of the Act. Even though several decisions are cited, some of which are referred to by the learned Single Judge in the judgment under appeal, we do not find any such case deals with building owner's request only for demolition of remaining portion of the building occupied by tenants in exercise of right conferred under Section 49(1) of the Act. The claim of respondents 3 and 4 can be granted only when the Collector considers that remaining portion of the building is unsuitable, weak and of such low value that it is not in public interest to acquire land on which such portion of building is situated to preserve the building. Even though Government is bound to acquire remaining portion of the building along with the part of the building acquired, if request is made by the building owner under Section 49(1) of the Act, it is for the Collector to decide whether the building should be retained or demolished. While counsel for the appellants contended that acquisition of balance portion of the building under Section 49(1) visualises acquisition of land on which such portion of the building is also situated, counsel for respondents 3 and 4 contended that

acquisition of land on which balance portion of the building is located is not contemplated as the Section specifically provides for acquisition of only balance portion of the building and not with the land. In support of this contention counsel further submitted that law permits separate ownership of land and building thereon by different persons. However, whatever be the situations in which land and building thereon can be owned by different persons, we do not think such a situation is contemplated under Section 49 (1) of the Act because what Section says is that at the request of landlord, the balance portion of the building "shall be so acquired" which only means that acquisition of the remaining portion of the building is done in the same way as acquisition of part of the building notified for acquisition which involves acquisition of land on which such portion of the building acquired is located. In order to test whether the legal position canvassed by counsel for respondents 3 and 4 could be applied to this situation, we have to consider the natural consequences after acquiring remaining portion of the building by the Government. As already held above, the Collector after acquisition of remaining portion of the building in terms of request of the building owner under Section 49(1) of the Act is not bound to demolish it and he is free to retain the building for public purpose that is, for the purposes of the Government. If the acquisition of building does not require

acquisition of the land on which building is located, then the building owner acquiring it; that is Government, has a right to maintain and repair it and use it for their purpose. If Government exercises this option, then the original building owner virtually looses his right over the land over which acquired building is located because the Act does not provide even payment of ground rent by Government after acquisition of remaining portion of the building at the request of it's owner. So far as demolition of balance acquired portion of the building is not provided under the Act, we are of the view that Section 49(1) contemplates acquisition of remaining portion of the building with the land thereon and if the building owner desires for acquisition of remaining portion of building, it necessarily follows that he has no objection in acquiring the land on which such portion of building is located and he is entitled to compensation for remaining portion of the building and the land on which it is situated. What Section 49(1) contemplates is acquisition of balance portion of the building and not building materials after demolition of building which is what respondents 3 and 4 have demanded. However, the only exemption we see to this position is when the Collector is of the view that the building is not good enough to be retained in public interest by paying compensation for the land also, and in that event it is upto him to pay compensation for the balance

portion of the building, demolish it, recover it's value and then surrender possession of land to the owner. This is a matter to be decided on the facts applicable to each case.

3. Assume for argument sake, the section does not admit of acquisition of land on which balance portion of the building is located which the Government is bound to acquire under Section 49(1) on request from the building owner, still we are of the view that if the building is of such value which includes the returns therefrom and if the right of the land still vests with the building owner, then having invested public funds by paying compensation for a building worth protecting or preserving, it becomes the duty of the Government in public interest to protect such investment by acquiring the land for preserving the building. In other words, since the Government is paying compensation for the balance portion of the building and if it does not lead to perfection of title for want of right in land, it becomes the obligation of the Government in public interest to acquire the land on which balance portion of the building is located in separate proceeding to protect public money invested for acquisition of balance portion of building. In either view of the matter, we are not in a position to uphold the finding of the learned Single Judge that based on request by respondents 3 and 4, respondents 1 and 2 were bound to

demolish the remaining portion of the building in which appellants are carrying on business. Even though tenant's rights under the Buildings (Lease and Rent Control) Act gets extinguished in acquisition proceedings and Government can evict tenants from notified property, we are of the view that as far as possible, the Act should not be enforced malafide and in violation of statutory rights of tenants under the Buildings (Lease and Rent Control) Act. Counsel for respondents 3 and 4 made it very clear that the building owners are not interested in permitting acquisition of the land on which remaining portion of the building is located where appellants are carrying on business. According to him, all what they desire is demolition of the remaining portion of the said building at the hands of respondents 1 and 2. It is therefore clear that the attempt of respondents 3 and 4 is to get the appellants evicted from the building where they are carrying on business, with the help of respondents 1 and 2. As already held by us, the building owner has no right to seek only demolition of balance portion of the building under Section 49(1) of the Act, even though respondents 1 and 2 have an option to do so in situations visualised by us as above. However, in this case it is admitted that the area where the remaining portion of the building is situated is on the side of a busy thoroughfare where appellants are successfully carrying on business and the building returns rental income

to respondents 3 and 4. Since respondents 3 and 4 oppose acquisition of land on which the remaining portion of building is situated, there is no justification for first respondent to acquire remaining portion of building in terms of request by respondents 3 and 4 by spending public money.

The Writ Appeal is therefore allowed by vacating the judgment of the learned Single Judge and by allowing the O.P. through an order of prohibition restraining respondents 1 and 2 from demolishing remaining portion of the building occupied by appellants based on request of respondents 3 and 4 under Section 49(1) of the Act.

Sd/-
V.K.BALI
Judge

Sd/-
C.N.RAMACHANDRAN NAIR
Judge

pms

True copy

P.S. to Judge